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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

NO. _____

JAMES E. LEBER,
Petitioner

v

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and UNITED STATES DEPARTMENT OF THE INTERIOR
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. WHERE A RULE, 30 C.F.R., SECTION 700.5, INCLUDES THE STATES IN ITS DEFINITION OF A "PERSON", MAY A COMPLAINT FOR DISCRIMINATION AGAINST A STATE BE DISMISSED FOR LACK OF JURISDICTION.

II. WHERE CONGRESS PROVIDED FOR EXCLUSIVE REVIEW OF REGULATIONS PROMULGATED UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, MAY ANY OTHER COURT, IN THE FIRST INSTANCE, REVIEW SUCH REGULATIONS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, James E. Leber respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this preceding on January 6, 1986.

OPINION BELOW

The Opinion of the Court of Appeals, as yet unreported, appears in the Appendix. Also included in the Appendix is the opinion of the District Court for the Middle District of Pennsylvania and the Interior Board of Land Appeals. Also included is the decision of the Interior Board of Land Appeals in a companion case rendered after its decision in this case.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on January 6, 1986. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

United States Code, Title 30:

- Section 1293. Employee Protection

(a) Retaliatory Practices Prohibited

No person shall discharge or in any other way discriminate against or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter. ...

Code of Federal Regulations, Tite 30:

- Section 700.5 Definitions

[P]erson means an individual, Indian tribe when conducting surface coal mining and reclamation operations on non-Indian lands, partnership, association, society, joint venture, joint stock company, firm, company corporation, cooperative or other business organization and any agency, unit or instrumentality of Federal, State or local government including any publicly owned utility or publicly owned corporation of Federal State or local government. ...

STATEMENT OF THE CASE

This is an action arising from the discrimination and firing of a Surface Mining Inspector by the Commonwealth of Pennsylvania subsequent to his complaints of violation of Federal Law to the Federal Office of Surface Mining, United States Department of the Interior. Inspector Leber disobeyed his superiors and informed his federal counterparts at the Department of Interior's Office of Surface Mining ("OSM") of violations of and federal law and also wrote to the secretary with his complaints.

As a result of his complaints, the Petitioner, James Leber was subjected retaliatory measures from his superiors including being summoned to distant meetings on short notice, unusual paper work requirements, docking of pay for meetings with the Federal Office of Surface Mining,

and finally he was fired.

As a result of an investigation prompted by Mr. Leber's complaints, his superior was demoted two grades in pay. See Commonwealth v Sterling, 505 Pa. 7, 470 A.2d, 101 (1985).

During the course of this discrimination, a timely complaint was filed with the Office of the Administrative Law Judges of the United States Department of the Interior.

At the hearing in this matter, the Pennsylvania Department of Environmental Resources ("Department") moved for dismissal for lack of jurisdiction on the grounds that the Commonwealth was not a person within the meaning of the Surface Mining Control and Reclamation Act of 1977. The Honorable Joseph McGuire held that 30 C.F.R. Section 700.5 expressly defined persons as including States. The Department's Motion was renewed at the close of the hearing and was again denied.

An appeal was taken to the Interior Board of Land Appeals by the Department. The Interior Board of Land Appeals reversed, holding that the Department could not be a person within the meaning of the regulations or the Act unless it was engaged in surface mining operations.

Petitioner filed a timely Petition for Reconsideration requesting that the matter be remanded so that Petitioner could present evidence of the Department's surface mining operations.

A timely petition for review was filed pursuant to 30 U.S.C., Section 1276 in the United States District Court for the Middle District of Pennsylvania which affirmed the decision of the Interior Board of Land Appeals. A timely notice of appeal was filed by Petitioner pursuant to 28 U.S.C., Section 1291 in the United States Court of Appeals for the Third Circuit which affirmed on the

reasoning of a companion case.

During the pendency of this case, a companion action for discrimination was filed by Petitioner against the individual persons in the Department who committed discriminatory acts against him. The Commonwealth intervened in the second action. The Judge found the Commonwealth has engaged in surface mining operations. On appeal, the Interior Board of Land Appeals entered an order and opinion at No. 85-242 which is found in the Appendix, modified its order and opinion in this matter.

The Interior Board of Land Appeals held that contrary to its prior opinion, the Department could not under any circumstances, be a person.

The Third Circuit adopted the reasoning of the Interior Board of Land Appeals in the second Leber action and affirmed the first action on that ground.

The matter is before this Honorable Court on the Petition for a Writ of Certiorari by James E. Leber.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals creates an important recurring problem of jurisdiction undermining the enforcement of the Surface Mining Control and Reclamation Act of 1977.

Employee protection is crucial to the federal comprehensive scheme of surface mine regulation. Employee protection is found at 30 U.S.C., Section 1293. The breadth of the language demonstrates Congress's resolve to protect those who protect the general public. The Surface Mining Control and Reclamatio Act of 1977 was intended by the Congress to be an exercise to the fullest extent possible of its commerce clause powers to address a

critical national problem. See 30 U.S.C., Section 1202(m). Congress established a system of cooperative federalism in which the federal government and the states each assumed a role for regulation. If a state program is sufficiently stringent, the state receives "primacy" in the regulation of surface mining. The Federal Office of Surface Mining supervises state permitting and enforcement. The Commonwealth of Pennsylvania received primacy from the Department of the Interior in 1982.

Under primacy, state inspectors are responsible for enforcement of regulations which necessarily include federal surface mining regulations. The Interior Department, under its general rulemaking power, 30 U.S.C., Section 1211(c)(2), defined the States as persons. 30 C.F.R., Section 700.5.

The facts in this case underscore the

importance of the federal regulations defining the states as persons. Here, the Department fired the inspector who reported his supervisor. This was an inspector who reported violations of operations of the Pennsylvania Department of Environmental Resources in dredging coal from the Susquehanna River. Former Inspector Leber was ordered not to speak with his federal counterparts from the Office of Surface Mining and to stop citing violations. He disobeyed and was fired.

The Third Circuit's interpretation rests upon the narrow construction given to tax statutes. The opinion fails to liberally construe a statute to the fullest extent of the commerce clause. This Court, in Garcia v San Antonio Metropolitan Transit Authority, _ U.S.___, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), explained the reach of the commerce clause as appplied against the states. Id.

In the alternative, the Third Circuit's opinion is contrary to the holding in Parden v Alabama State Docks Department, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1984) which applied the Federal Employer's Liability Act, enacted under the commerce clause, to the states when engaged in interstate commerce. The opinion of the Third Circuit undermines the enforcement of environment standards contrary to the intent of the Congress.

The import of the Third Circuit's decision is to silence the nations most knowledgable mining people, the honest mine inspector. A federal regulation is ignored and the public is at risk.

2. The exclusive procedure for seeking review of regulations promulgated under the Surface Mining Control and Reclamation Act of 1977 is a Petition for Review to the District Court for the District of Columbia.

The Third Circuit's opinion raises an important issue of uniform national regulation an jurisdiction to review rules promulgated under the Surface Mining Control and Reclamation Act. 30 U.S.C., Section 1276.

Congress provided for an exclusive mechanism to promote uniformity of national regulations. Here, the Pennsylvania Department of Environmental Resources has used the appeal of James Leber to the Third Circuit to successfully invalidate a rule promulgated by the United States Department of the Interior. The rule expressly defines the States as persons for purposes of the Act. The proper procedure for the Department to invalidate the rule would be a Petition for Review to the United States District Court for the District of Columbia.

Unlike the Fifth Circuit in Ethyl Corporation v United States, 761 F.2d 1153 (5th Cir. 1985) (cert.den. at No. 85-376,

January 13, 1986), the Third Circuit considered the Rule and effectively partially repealed it. This was done in a non criminal context c.f. Adamo Wrecking Co. v United States, 434 U.S. 275, 98 S.Ct. 566, 54 L.Ed.2d 538 (1978).

The Interior Department has taken three positions during the course of this litigation. Initially, it agreed with Petitioner and began in investigation of the discrimination complaint. Subsequently, the Department reversed its position and supported the opinion of the Interior Board of Land Appeals which held that the States were "persons" only where they were involved in surface mining operations. After the second Interior Board of Land Appeals opinion in a companion case, the Department of the Interior has taken the position that states are persons for purposes of abandoned mine lands payments, environmental protection, and

other matters except for employee protection. To rescind the rule the Interior Department should be required to engage in proper rulemaking procedure.

By allowing piecemeal review of the regulations, the Court of Appeals creates the potential for non-uniform decisions as each Circuit considers the matter.

CONCLUSION

For these reasons, a Writ of Certiorari to issue to the Untied States Court of Appeals for the Third Circuit, or in the alternative, the judgment of the Third Circuit should be vacated and remanded for consideration in light of Garcia v San Antonio Metropolitan Transit Authority, ____U.S.____105 S.Ct. 1005, L.Ed.2d (1985).

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5166

JAMES E. LEBER,

Appellant

v.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and UNITED STATES DEPARTMENT OF THE INTERIOR

On Appeal from the United States District Court for the Middle District of Pennsylvania (Scranton)

(D.C. Civil No. 84-0723)

Argued November 19, 1985

Before: HIGGINBOTHAM, SLOVITER and MANSMANN, *Circuit Judges*

(Filed January 6, 1986)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

I.

Issue

At issue is a matter of first impression regarding the scope of section 703 of the Surface Mining Control and Reclamation Act of 1977. The district court held that the provisions of that Act governing the employer-employee relationship were not applicable to state agencies, because the state was not shown to be a "person." The Interior Board of Land Appeals has not always maintained a consistent interpretation of the relevant provisions, and apparently no other court has spoken to the issue.

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II.

Procedural Background

James E. Leber, a Surface Mine Conservation and Reclamation Inspector for the Pennsylvania Department of Environmental Resources (DER), filed a complaint with the United States Department of the Interior, alleging that DER had discriminated against him in violation of section 703 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1293, by retaliatory personnel actions against him because of his aggressive enforcement of the Act.[1] The matter was assigned to an administrative law judge.

DER moved to dismiss on the ground, *inter alia*, that it was not a "person" covered by the Act and thus its personnel decisions in regard to Leber were not within the jurisdiction of the Department of Interior. The ALJ denied DER's motion to dismiss and held a hearing on the merits. The ALJ also denied DER's subsequent motion to certify the jurisdictional issue for interlocutory appeal to the Interior Board of Land Appeals (IBLA). DER then petitioned the IBLA, pursuant to 43 C.F.R. § 4.1272, for permission to pursue an appeal of the ALJ's interlocutory ruling on jurisdiction.

The IBLA granted the petition, and ruled that DER "is not a person for purposes of an employee protection proceeding under 30 U.S.C. § 1293 (1982)" because it

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1. Leber's allegations of DER discriminatory actions, as summarized in his later application for temporary relief, included increasing his work hours in excess of state regulations, transferring him, having his gun permit revoked, threatening discharge, withholding and downgrading his performance evaluations, requiring overtime work without compensation, and harassing, cajoling and reprimanding him for the performance of his job. App. at 5-7.

had not been shown to be an employer "conducting operations which are regulated under [the] Act." On remand, the ALJ dismissed the case. Leber's petition for reconsideration to enable him to demonstrate that DER is engaged in coal mining and thus subject to the Act was denied by the IBLA.

Plaintiff petitioned for review in the United States District Court for the Middle District of Pennsylvania pursuant to 30 U.S.C. § 1276. After directing that the Department of the Interior be joined as an additional respondent, the district court upheld the IBLA's ruling. Plaintiff has appealed the district court's denial of his petition for review.[2]

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2. The allegations raised in this case (*Leber I*) also were the basis for the following other actions:

1. Leber brought a similar proceeding arising out of the same facts against seven supervisory employees of DER. The ALJ ruled that DER had engaged in surface coal mining. However, the IBLA ruled that a state agency, even if engaged in surface coal mining operations, was not subject to a § 703 suit by an employee, Leber v. Sterling (*Leber II*), 88 IBLA 224, 234-35, 238 n.7 (1985). Therefore, it declined to reach the issue whether DER was engaged in surface coal mining, *id.* at 229-30 n.4.

2. Shortly after *Leber II* was filed, the Department of Interior began an investigation of Leber's charges of discrimination. The DER employees named in *Leber II* sought an injunction to halt the investigation. Sterling v. Clark, Civ. No. 84-0500 (M.D. Pa.). The district court issued a temporary restraining order but, after the Department of Interior dropped its investigation pursuant to *Leber I*, the court dismissed the motion for a preliminary injunction as moot.

3. Leber appealed from his 5-day suspension in 1982 for carrying a firearm while on duty to the Pennsylvania State Civil Service Commission, which affirmed his suspension. Leber v. Bureau of Mining and Reclamation, Department of Environmental Resources, Appeal No. 4324 (Pa. Civil Service Comm., July 6, 1983).

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The issue before us involves a question of law, as to which our review is plenary.

III.

Statutory and Regulatory Background

Congress passed the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982), expressing in the statute the dual purposes, *inter alia*, "to protect society and the environment from the adverse effects of surface coal mining operations" while still "assur[ing] that the coal supply essential to the Nation's energy requirements . . . is provided." 30 U.S.C. § 1202(a) and (f).

The statute provides for the comprehensive control and regulation of surface coal mine operations. It withstood various constitutional challenges in *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), and *Hodel v. Indiana*, 452 U.S. 314 (1981).

Title II places the primary responsibility for the Act's administration and enforcement in the Secretary

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4. Leber also appealed his January 30, 1984 Performance Evaluation Report, his assessments of absence without leave, and his four suspensions from his position as Inspector to the Pennsylvania State Civil Service Commission, which upheld all but one of these actions. Leber v. Department of Environmental Resources, Appeal No. 4856 (Pa. Civil Service Comm., Jan. 30, 1985).

5. Leber also filed a complaint with the Pennsylvania Human Relations Commission, Leber v. Commonwealth of Pennsylvania, Department of Environmental Resources, Bureau of Mining & Reclamation, No. E-25849-D, and the EEOC, EEOC031833647, alleging harassment by supervisor Dieterle on basis of his ancestry (German). The Pennsylvania HRC dismissed the complaint for lack of probable cause that discrimination occurred. The EEOC found no reasonable cause to believe a violation of Title VII occurred and issued a right to sue letter.

of the Interior, acting through the Office of Surface Mining Reclamation and Enforcement, who is authorized and directed to promulgate the regulations necessary to its implementation. 30 U.S.C. § 1211. Title IV of the Act covers abandoned mine reclamations, Title VI covers designation of lands unsuitable for noncoal mining, and Titles III, VIII and IX deal with aspects of research.

Title V contains the principal regulatory and enforcement provisions relating to surface coal mining. It establishes federal performance standards which must be satisfied in two stages, an interim phase and thereafter a permanent phase. In line with the cooperative federalism that characterizes much recent legislation, the Act contemplates enforcement roles by both the federal government and the states. The Secretary has the obligation to promulgate the interim phase regulations, with the state issuing permits pursuant to those interim regulations. If the Secretary approves the state's proposed permanent program, the state is to assume permanent regulatory authority over much of the surface mining operations within its borders. 30 U.S.C. §§ 1252(a)-(b) and 1253.

A discrete provision covers surface coal mining operations conducted by public agencies, whether federal, state, or local. Section 524 provides:

> Any agency, unit or instrumentality of Federal, State, or local government, including any publicly owned utility or publicly owned corporation of Federal, State, or local government, which proposes to engage in surface coal mining operations which are subject to the requirements of this chapter shall comply with the provisions of this subchapter.

30 U.S.C. § 1274.

Title VII contains administrative and

miscellaneous provisions. Section 703 offers protection to "whistle blowing" employees. It reads, in pertinent part, as follows:

> No *person* shall discharge, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

30 U.S.C. § 1293(a) (emphasis added). On application of an employee, the Secretary of the Interior must investigate such alleged discrimination and, after finding a violation of section 703(a), may order the violator to take "affirmative action to abate the violation." 30 U.S.C. § 1293(b).

Section 701(19) of the Act defines "person" as "an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." 30 U.S.C. § 1291(19). The initial regulations promulgated pursuant to SMCRA defined "person" in the same manner. *See* 30 C.F.R. § 700.5 (1978). On the face of the statute and the initial regulations, a state governmental agency, such as DER, would not be a "person" liable under section 703 for discrimination against an employee who sought to enforce the Act.

Leber, whose suit is filed under section 703, concedes that the state is not a "person" under the Act. He argues, however, that an amendment to the regulations in 1979 changing the definition of "person" sufficed to expand the scope of section 703 to

cover states and state agencies as employers. The amended regulation reads as follows:

> *Person* means an individual, Indian tribe when conducting surface coal mining and reclamation operations on non-Indian lands, partnerships, association, society, joint venture, joint stock company, firm, company, corporation, cooperative or other business organization and any agency, unit, or *instrumentality of Federal, State or local government* including any publicly owned utility or publicly owned corporation of Federal[,] State or local government.

30 C.F.R. § 700.5 (1980) (second emphasis added).

As originally proposed, this regulation would have limited "person" as applied to government agencies to only those government agencies proposing to conduct surface mining operations. This limitation was deleted before the regulation became final. It is Leber's position that because this regulation was within the statutory authority given to the Secretary to promulgate implementing regulations, its effect is to bring governmental agencies, including DER, within the scope of SMCRA for all purposes and, specifically in this case, within the scope of section 703.

The Office of Surface Mining (OSM) gave a different explanation for "amplifying" the definition of "person" in section 701(19) of the Act to include governmental agencies. Because its explanation is highly significant to the issue before us, we quote it at length:

> *. . . In addition, specified governmental agencies are included, because under Section 524 of the Act, they are subject to regulation when engaged in surface coal mining and reclamation operations and because such agencies have definite interests in actions*

taken under the Act. (See discussion under Paragraph 3 below.) . . .

1. The Office received several comments which argued that the definition of "person" exceeds OSM's statutory authority because it is not identical to Section 701(19) of the Act. OSM is not required to adopt verbatim the statutory definitions in regulations implementing the Act. Section 201(c)(2) of the Act authorizes regulations which will carry out the purposes and objectives of the Act.

. . .

3. *The final definition of "person" has been changed from the proposed rule so as to delete the limitation that only government agencies proposing to conduct surface coal mining operations would be covered.* A number of State government and industry commenters criticized the proposed definition of "person" on the basis that since it amplifies the statutory definition it would allow government agencies to sue other government agencies and also allow agencies to become involved in the hearing processes under the Act. Commenters felt that this would subject the regulatory authority to restrictions not imposed by the Act and subject it to liabilities never contemplated by Congress. It was further felt that the definition would provide particular problems in and among various State agencies by providing legal standing that currently does not exist and was not intended to exist under the Act.

It is true that a potential for interstate or intrastate conflict exists where the genuine

interests of separate agencies may be involved. To a great extent however, the commenters' fears are unwarranted since the regulations allow appeals and suits only for persons "who are or may be adversely affected." (See, *e.g.*, 30 CFR 760.4(d), 764.13(a).) On balance, OSM has concluded that the purposes of the Act will be best served if the statutory definition is broadened to include governmental entities.

The Act mandates the involvement of and close coordination among many different agencies. Various agencies play important roles in the abandoned land's program in Title IV of the Act, in the regulatory process in terms of providing data, permit application reviews, performance standards compliance, and in designation of lands unsuitable for all or certain types of surface coal mining operation. (See Sections 503(a)(6), 504(b), 507(b)(11), 508(a)(9), 510(b)(3), 510(c), 515(b)(2)(8), 515(b)(10)(B), 515(b)(12), 515(c), 515(e) and 522 of the Act. See also the detailed discussion in the preamble to 30 CFR 786.11(c)(1)-(4), *infra*.)

OSM believes the involvement of other State and local agencies, which the Act specifies, establishes an interest on the part of those agencies in actions taken by the regulatory authority under State programs, particularly actions relating to permits and designations. Therefore, OSM believes that inclusion of the government agencies in the definition of "person" is justified. *OSM does not intend by this to expand upon an agency's capacity to sue or be sued where the Act does not clearly indicate that the agency has an interest in the actions being taken.* In such

> situations, existing principles of State or Federal law would govern.

44 Fed. Reg. 14912 (1979) (emphasis added).

IV.

Discussion

As an initial matter, we must consider whether there is any statutory limitation on our jurisdiction over this issue. Leber argues that if DER believes the regulation is improper, it was required to file an action in the United States District Court for the District of Columbia Circuit, as provided in 30 U.S.C § 1276(a)(1). Leber misstates DER's position. DER does not challenge the regulation's legality, but only Leber's interpretation of it. That issue is properly before us.

Turning then to the statutory language, it is clear that the omission of "state" or "state agency" from the statutory definition of "person" was not inadvertent. The same definitional section defines "State," "State program," and "State regulatory authority." 30 U.S.C. § 1291 (24)-(26). Under accepted rules of statutory construction, "[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (citing 2A C. Sands, Statutes and Statutory Construction § 47.07 (4th ed. Supp. 1978)). Thus the statutory list of terms defining "person" is exclusive rather than exemplary.

The omission of states and state agencies from the SMCRA's statutory definition of "persons" does not exempt those agencies that engage in coal mining operations from the Act's performance requirements. As noted in the preceding discussion, section 524 of the Act treats governmental agencies engaging in surface coal mining activities comparably to those of

private companies. In those circumstances, the governmental agency is required to "comply with the provisions of this subchapter [Title V]", 30 U.S.C. § 1274. However, section 524 does not subject the government agency, even if engaged in surface coal mining activities, to section 703, the "whistle-blowing" provision.

Leber argues that the amendatory regulation covers state agencies even when they are not conducting surface mining operations because of the deletion of the proposed limitation that would have defined as "persons" only those government agencies proposing to conduct surface mining operations. Alternately, he contends that if proof of DER's participation in surface mining is necessary to establish that it is a "person" within the meaning of § 703, the case should be remanded to allow him the opportunity to present proof on that issue because he was not previously on notice that such evidence would be required.

If Leber's construction of the regulation and its effect were persuasive, it would draw into issue the principle that regulations cannot expand the reach of the underlying statute. *See Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs, United States Department of Labor*, 461 U.S. 624 (1983); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 (1976); *Max Sobel Wholesale Liquors v. Commissioner of Internal Revenue*, 630 F.2d 670, 672 (9th Cir. 1980). That might indeed be an issue within the exclusive province of the federal courts for the District of Columbia under 30 U.S.C. § 1276(a)(1). We conclude, however, that Leber's proposed construction does not withstand analysis.

The inference Leber would have us draw from the amended regulation is belied by OSM's

contemporaneous comments. That agency explained that because various government agencies played important roles in various aspects of the Act, they were being included as "persons" to permit their involvement "in actions taken by the regulatory authority under State programs, particularly actions relating to permits and designations." 44 Fed. Reg. 14912 (1979). The ambiguity of that explanation was clarified somewhat by a post-argument submission by counsel for the government, requested by the court. He offered the following example of how the expanded definition of person might work in a particular situation:

> Section 764.13 of Title 30 of the Code of Federal Regulations provides in part that, "[a]ny person having an interest which is or may be adversely affected has the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations, or to have an existing determination terminated." It appears that the definition of "persons" was expanded so that the various federal [,] state and local agencies which are implicated by the Act could participate in proceedings like that described in 30 C.F.R. 764.13.

Letter from David Shilton, Counsel for the Department of the Interior, to the Court (November 20, 1985).

Mr. Shilton's letter also stated that the reference in the preamble to the 1979 regulations to the "definite interests [of specified governmental agencies] in actions taken under the Act", 44 Fed. Reg. 14912, applies, *inter alia*, to "the abandoned lands program of Title IV of the Act, 30 U.S.C. 1231-1243, under which states may receive funds for reclamation purposes (30 U.S.C. 1231), and may administer reclamation programs (30 U.S.C. 1235); and the provisions for

designating areas unsuitable for surface coal mining found in Section 522, 30 U.S.C. 1272, under which states play the primary regulatory role."

The IBLA, the ultimate agency reviewing authority for actions taken under SMCRA, found that "the statutory definition of a 'person' does not embrace a governmental agency", *Leber v. Pennsylvania Department of Environmental Resources*, 80 IBLA 200, 204 (1985), and "that the definition of person was expanded [by the regulations] for only limited purposes" which do not include "an employee protection proceeding under 30 U.S.C. § 1293," *id.* at 206. It concluded:

> Clearly, the intent of the regulations was to consider an agency, such as PDER, a "person" to the extent it might be conducting surface coal mining operations under the Act or to the extent it might be involved in those functions highlighted in the preamble, *i.e.*, abandoned lands program, the regulatory process in terms of providing data, permit application review, performance standards compliance, and designation of lands unsuitable for all or certain types of surface coal mining operations.
>
> There is no indication that the Department intended to create a new forum whereby state employees could seek review of actions taken by the state with regard to state employment practices.

Id. (citations and footnotes omitted).

Ordinarily, a court will defer to an agency's interpretation of its own regulations unless an agency exceeds its statutory authority or inconsistently construes a statute. *Morrison-Knudsen v. Director, OWCP*, 461 U.S. at 635; *United States v. Clark*, 454 U.S. 555, 565 (1982). *See Ernst & Ernst v. Hochfelder*,

425 U.S. at 198-201. *See also* 5 K. Davis, Administrative Law Treatise § 29:16 (1984). In this case, deference to the agency's interpretation may be particularly relevant because it was the agency's action in redefining "person" in the regulation that forms the principal basis for plaintiff's proffered interpretation of "person".

Even if the scope of the regulation redefining "persons" is still less than pellucid, we are satisfied that the regulation was not intended to expand section 703 to states or state agencies by OSM's own statement that "OSM does not intend by this to expand upon an agency's capacity to sue or be sued where the Act does not clearly indicate that the agency has an interest in the actions being taken." 44 Fed. Reg. 14912.

For these reasons, we reject Leber's contention that the regulation brings state agencies within the definition of "person" for purposes of an employee discrimination suit brought under section 703 without reference to whether the agency is engaged in surface mining operations.

In *Leber I*, the IBLA suggested that DER would be a "person" within the meaning of section 703 if it was shown to participate in surface mining. The district court accepted this statutory interpretation. The court further held that since the issue was jurisdictional, Leber had the burden of producing the relevant evidence of DER's mining activity. On appeal Leber argues that the district court and the IBLA erred in failing to remand to allow him the opportunity to present proof on that issue because he was not previously on notice that such evidence would be required.

While this case was on appeal, the IBLA issued its opinion in *Leber II* in which it concluded, consistent with its ruling in *Leber I*, that DER is not a "person" for purposes of a section 703 employee protection

proceeding. *Leber v. Sterling*, 88 IBLA 224 (1985). After reviewing the relevant statutory provisions and regulations, it also "expressly modif[ied] our decision in [*Leber I*] to the extent that it indicated a state agency engaged in coal mining operations could be subject to a section 703 employee protection proceeding." *Id.* at 239. We agree that since the statute does not make the state a "person" for purposes of section 703 of the Act, and the regulation does not purport to expand the statute for that purpose, it is irrelevant in this case whether DER is or was engaging in surface mining operations. Therefore, there is no need for a remand to produce evidence on that issue.[3]

V.

Conclusion

We summarize our conclusions as to the coverage of states and state agencies. A state proposing to engage in surface mining operations is covered by Title V of the SMCRA under the explicit provision of section 524. *See* 30 U.S.C. § 1274. The regulation amended in 1979 to provide that the term "person" also means "any agency, unit, or instrumentality of Federal, State or local government." 30 C.F.R. § 700.5 (1980), had the limited purpose of allowing state agencies to become involved in certain regulatory proceedings and was not intended to subject state agencies to section 703 employee protection proceedings, even were that within the permissible scope of regulatory action. Therefore, the district court's action in denying Leber's petition for review from the IBLA's action in dismissing his section 703 proceeding against DER was not error.

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3. Because we agree that a state agency is not a "person" under § 703 of SMCRA, we do not reach DER's remaining arguments founded on collateral estoppel, and the Tenth and Eleventh Amendments.

As we pointed out in note 2 *supra*, Leber has had and availed himself of the opportunity to have the merits of his claim evaluated by the appropriate state and federal authorities. However, the route that he sought in this case was not authorized by statute. Therefore, we will affirm the district court's judgment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES E. LEBER, Plaintiff	)	
v	)	Civil Action No.
PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, Defendant	)	84-0723

MEMORANDUM

Statement of the Case

Petitioner James E. Leber has consistently alleged that he is the victim of discriminatory acts on the part of the Pennsylvania Department of Environmental Resources, (PaDER).

In July of 1983, in response to Mr. Leber's petition, a hearing was held before the Honorable Joesph E. McGuire, Administrative Law Judge, Untied States Department of the Interior.

PaDER moved for dismissal of the action on the bases that it was not a person within the meaning of section 703 of the Surface Mining Control and Reclamation Act of 19877 (SMCRA),

30 U.S.C. Section 1293. Administrative Law Judge McGuire heard argument and denied the motion.

At the conclusions of the hearing on July 22, 1983, PaDER moved to certify an interlocutory appeal to the Interior Baord of Land Appeals (IBLA). Administrative Law Judge McGuires denied this motion.

On August 16, 1983, PaDER filed with IBLA (1) a petition for permission to appeal the denial of certification for purposes of an interlocutory ruling by Administrative Law Judge McGuire, of the issue of whether the Department was a "person" as defined by section 701(19) of the Act for purposes of a section 703 employee protection proceeding, and (2) a request for a stay.

On September 9, 1983, the IBLA entered an order granting permission to PaDER for an interlocutory appeal and staying all proceedings.

On April 24, 1984, the IBLA entered its decision reversing Administrative Law Judge McGuire and finding that PaDER could not be a person within the meaning of section 703 unless it was engaged in surface mining operations. The IBLA further held that there was nothing on the record before it to support a finding that PaDER was so engaged.

The matter was remanded to Administrative Law Judge McGuire who dismissed the action on May 2, 1984. On May 11, 1984, Leber filed a Petition for Reconsideration of the IBLA decision of April 24, 1984 asking that the record be reopened so that he could demonstrate that PaDER "is in fact engaged in coal mining."

On May 24, 1984, the IBLA denied Leber's Petition for Reconsideration.

On May 29, 1984 a timely Petition for Review was filed by Mr. Leber before this court.

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On June 18, 1984, PaDER filed a Motion to
miss which was denied by this court on
ober 1, 1984.

On October 1, 1984, this court ordered
t the United States Department of the
erior be joined as an additional
pondent.

On October 31, 1984, this court issued a
orandum and order setting forth the issued
be addressed by all parties.

. What is the standard of review to be
lied by this corut when reviewing a decision
the IBLA?

. Which of the parties involved in IBLA 83-
, if any, had the burden of presenting
dence at the proceeding which would have
wn that PaDER was or was not engaged in
face coal mining operations and therefore
or was not a person under the Act?

. Was the ruling by the IBLA, that PaDER was
a "person" for purposes of employee

protection pursuant to 30 U.S.C, Section 1293 because it was not conducting surface coal mining operations, supported by evidence on the record before the board or was it clearly erroneous because of the absence of such supporting evidence?

All briefs having been received, the matter is ripe for disposition.

Discussion

A. The Appropriate Standard of Review

The standard for judicial review is set forth in 30 U.S.C. Section 1276(b):

> The court shall hear such petition or complaint solely on the record made before the secretary. Except as provided in subsection (a), the findings of the secretary if supported by substantial evidence on the record considered as a whole, shall be conclusive.

Under the Substantial Evidence Rule, the reviewing court must accept findings supported by "such relevant evidence as a reasonable mind might accept as adequate to support the

conclusion." Whirlpool Corp. v. O.S.& H. Reivew Commission, 645 F.2d 1096 (D.C. Cir. 1981).

Under the facts of the instant case, it seems clear that there was no evidence to support a finding that PaDER was engaged in surface coal mining operations. In the absence of such evidence - keeping in mind that since Mr. Leber, the petitioner, wanted to the Act against PaDER, it was his burden to show that PaDER fell within the applicable provisions - the Board's finding seems entirely proper. Stated another way, the absence of evidence presented by petitioner Leber before either Administrative Law Judge McGuire or the IBLA to support his claim that PaDER was subject to section 703 of the Act (i.e. to establish the essential element of jurisdiction) creates the kind of record that reasonable men and women might accept as adequate to support a conclusion. Samedan Oil Corp. v Cotton Petroleum Corp., 466F.Supp. 521 (W.D.Oklahoma 1978). That conclusion would be that PaDER was

not engaged in the type of activity which would have made it a "person" to be regulated under the Act, and that, in fact, is the conclusion set forth by the IBLA in its decision of April 14, 1984.

The above analysis is premised on this court's opinion that the burden of proof before the IBLA was on petitioner Leber. This issue was the second of the three this court required to be addressed in memoranda and will be discussed here.

The most direct way to state this court's position on the burden of proof issue is to point out that a petition (in this case Mr. Leber) has the burden of establishing each element of his case including jurisdiction.

Generally, when federal jurisdiction is challenged, the burden is on the plaintiff to establish its existence. Gibbs v. Buck, 307 U.S. 66, 72 (1938); Schering Corp. v. U.S., 626 F.2d 162 (C.C.P.A. 1980); Krasnov v Dinan, 465

F.2d 1928, 1301 (3d Cir. 1972). Applying these principles of federal jurisdiction to the instant appeal, it is clear that the burden of establishing the existence of federal jurisdiction over PaDER rested with the petitioner; even after PaDER challenged that jurisdiction with its Motion to Dismiss, it is not the burden of a defendant respondent to prove the existence of a negative.

Petitioner is his brief asks the court to believe that it was PaDER's duty to prove a negative rather than Leber's duty to prove a positive as a prerequisite to his employing and enjoying the protections of the Act.

It is also worth notine that a private applicant for review in a section 703 employee protection proceeding should not and cannot stand in a better position than the Office of Surface Mining (OSM) would in a proceeding to enforce its regulations under section 518 and 521 of the Act. Under those sections, the

burden of proof is on OSM (the petitioner). See 43 C.F.R. 4.1155 and 4.1171.

A review of petitioner's application for review indicates that there was not a single allegation that the Department was/is engaged in surface coal mining operations. Furthermore, testimony at the four day administrative hearing in July of 1983 shows that PaDER alleged that neither it nor the Commonwealth were mining coal or conducting surface coal operations (pp. 17, 18 and 10 of the hearing transcript). That transcript shows that references and citations to 44 Federal Register 14912 had been put in evidence. This language is quoted infra. The transcript further shows that PaDER asserted that, since the Commonwealth was not engaged in the surface mining of coal, it could not be regulated under the Act. It is also important to note that Mr. Leber and his attorney had notice by early February of 1983 of Pa.DER's intent to

challenge jurisdiction on these grounds. On February 1, 1983, some five-and-one-half months before the hearing, Attorney Ging was copied with a letter from the Chief Counsel of PaDER to an attorney at the Department of the Interior. In this letter, PaDER clearly states its intention and position:

> In addition the Commonwealth does not think that it is covered under 30 C.F.R. 865(11)(b) in that that section actively contemplates that the employes is "conducting operations." The Commonwealth was not engaged in mining activity when it suspended Mr. Leber and was thus not covered under these regulations.

Considering Leber's duty to establish jurisdiction, it does not seem unreasonable to this court to hold that this proposed argument should have been met head on and overcome if possible by evidence at the hearing on July 19, 1983.

Furthermore, when the matter was briefed for appeal before the IBLA, Leber's counsel

alerted by the "engaging in surface mining" arguments put forth by the Department of Interior in its brief filed December 13, 1983 (at pp. 6 and 7), might have requested the IBLA to allow the presentation of evidence on this issue or to remand to the Administrative Law Judge for further evidnece-taking on this issue so that petitioner Leber could firmly and finally establish jurisdiction.

At the hearing in July, the Administrative Law Judge disagreed with PaDER's argument that engaging in surface mining was a prerequisite to jurisdiction over it under the Act. On pages 20 and 21 of the transcript of the hearing, Judge McGuire states:

> The final definition of person has been changed from the proposed rule, so as to delete the limitation that only government agents - agencies proposing to conduct surface coal mining operations would be covered. A number of state governments and industry commentator [sic] criticized the proposed definition of person on the basis that since it amplifies the statutory definition is [sic] would allow

> government agencies to sue other [sic] and would allow agencies to become involved in the hearing processes under the Act. Commentors felt that this would subject the regulatory party to restriction not imposed by the Act but subjected to liabilities never contemplated by Congress. It was further felt the definition would provide particular problems in and among various state agencies, by providing legal standing that currently does not exist and was not intended to exist under the Act, and so on.
>
> There is later language in the regulations that the secretary clearly intended state governments to be treated by [sic] persons. Are you aware of that ? (Tr. pp. 20-21)

These remarks clearly show that the argument that a state or state agency must be engaged in surface mining activities in order to be considered a person under the Act was made and discussed at the admininstrative hearing where evidence could and/or should have been offered.

The transcript also shows that no argument to the contrary was made by petitioner Leber. In fact, since the Administrative Law Judge was clearly leaning in his direction, Leber's

counsel, in response to the Administrative Law Judge's invitation to argue the issue, simply asserted his reliance on the language of the statute and his belief that "the court understands our position - perhaps better than we do". (Tr. p. 26) Leber's counsel chose not to introduce evidence which either rebutted PaDER's reading was correct, the Department was engaged in such activities. It is well established that issues not effectively presented to an administrative agency, where ample opportunity to do so has been afforded, cannot be raised on appeal of that agency's decision. Hennessey, Securities and Exchange Commission, 285 F.2d 511 (3d Cir. 1961).

In short, the petitioner did not introduce any evidence to support finding that PaDER was engaged in surface mining and should therefore be considered a person legitimately regulated by the Act. The IBLA, in the absence of such evidence, correctly and reasonably, applied the

legislative history of the Act, principles of statutory construction and case law to the question before it. See IBLA opinion of 4/24/84 at 80 IBLA 204-207. The result was a finding that the Department was not a person for purposes of an employee protection proceeding brought pursuant to section 703 of the Act.

We turn now to the third issue, although we note again that all three are intertwined. That question was stated as follows:

> Was the ruling by the IBLA that PaDER was not a "person" for purpoess of employee protection pursuant to 30 U.S.C. Section 1293 because it was not shown to be conducting surface coal mining operations, supported by evidence on the record before the Board or was it clearly erroneous because of the absence of such evidence?

Petitioner Leber, relying on his earlier argument that PaDER was required to prove that it was not regulated under section 703 of the Act by showing that it fell into an exception to the general definition of "person." asserts that PaDER did not support its position with

evidence on the record before the Board; therefore, according to Mr. Leber, the Board's decision of April 14, 1984 being unsupported was clearly erroneous and should be reversed.

Mr. Leber's argument copncerning where burden of proof lay has been discussed and rejected supra. Nevertheless, Leber makes an alternative argument which is worthy of discusion. He states:

> Assuming arguendo that this court finds that petitioner Leber had the burden of proof, it is suggested that there was no duty to offer evidence subsequent to the denial of the Department's Motion to Dismiss. (Tr.51) Since Judge McGuire had ruled that the Department was a person within the meaning of the SCRMA, any further evidence would have been cumulative....
>
> Only after the IBLA decision of April 24, 1984, set forth a new definition of "person" as it relates to the states, did petitioner or the Department have reason to know that such proof was required.

Petitioner's brief filed 11/15/84 at p. 13.

While this argument is interesting, it is not an entirely accurate restatement of the situation. In the first instance, we must

repeat that it is and was Leber's continuing responsibility to establish the clearly challenged jurisdiction. Secondly, we refer once again to to PaDER's letter ot February 1, 1983 explaining its jurisdictional defense and the actual presentation of that defense at the heraing before Administrative Law Judge McGuire. Thirdly, among the briefs submitted to the IBLA for its consideration of the jurisdictional issue was one by the United Stated Department of the Interior. This brief, referred to earlier in this memorandum, was filed December 13, 1983 (before Leber's brief on the issue). It clearly puts in issue the relationship of a party's active engagement in surface mining to its meeting the definition of person under the Act. At page 6 of that brief, the Department of Interior states:

> In amplifying the definition of "person" the Secretary stated that "specified governmental agencies are included because under section 425 of the Act, they are subject to regulation when engaged in

> surface coal mining and reclamation operations and because such agencies have definite interests in actions taken under the act. (Citing 44 F.R. at 14912).
>
> Amplification of the definition of "person" to include any agency, unit or instrumentality of federal, state or local government was intended to make the provisions of the Act applicable to any agency, unit, or instrumentality of government when: (a) the agency, unit or instrumentality of government itself proposed to conduct surface mining operations or was in fact conducting surface mining operations; and where (b) the agency, unit or instrumentality of government exercised or otherwise invoked the provision of the Act.

Surely this clear indication of the prerequisties for including an agency with the definition of "person" and the jurisdictional reach of the statute should not have gove unnoticed by the party upon whom rested the continuing burden to establish jurisdiction.

PaDER in its brief to this court filed December 14, 1984 points out that no evidence was put before the IBLA that would provide support for a finding that PaDER was a "person" under the Act. Furthermore, there was not even an allegation before the Board that PaDER was

engaged in surface coal mining operations. The Board simply correctly applied the legislative history of the Act, its implementing regulations, principles of statutory construction and case law to the evidence before it. This resulted in the Board's finding that the Department was not engaged in surface coal mining operations and was, therefore, not a person for purposes of an employee protection proceeding brought pursuant to section 703 of the Act. This decision was supported by the record (or lack thereof) considered as a whole and will not be altered by this court on review.

/S/ Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

DATED: February 11, 1985

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
May 24, 1984

IBLA 83-867	:	Docket No. CH 3-2-D
	:	
JAMES E. LEBER	:	Application for Review
	:	of Alleged Discriminatory
v	:	Action
	:	
PENNSYLVANIA	:	Petition for
DEPARTMENT OF	:	Reconsideration Denied
ENVIRONMENTAL	:	
RESOURCES	:	

ORDER

Counsel for James E. Leber has filed a petition for reconsideration of the Baord's decision in James E. Leber v Pennsylvania Department of Environmental Resources, 80 IBLA 200, 91 I.D. ___ (1984). As grounds for the petition, counsel has asserted that the Commonwealth of Pennsylvania is engaged in coal mining. Petitioner contends that the Board's decision was grounded on a determination that the Commonwealth of Pennsylvania was not engaged in coal mining. Petitioner requests the opportunity to present evidence that the

Commonwealth is engaged in coal mining.

As a preliminary matter, we note the absence of any evidence that the petition for reconsideration was served on the other parties to the case. The regulations governing proceedings before the Office of Hearings and Appeals require that a copy of each document filed in a proceeding be served on the other parties in the case. 43 CFR 4.22(b). In light of our view on the merits of the petition for reconsideration, we find it appropriate to dispose of the matter rather than return the petition for service upon the other parties to the case.

The Board found in its decision that the Pennsylvania Department of Environmental Resources (PDER) was not a "person" for purposes of an employee protecton proceeding under section 703 of the Surface Mining Control and Reclamation Act of 1977: "The inescapable conclusion is that a 'person' under 30 U.S.C.

Section 1293(a) is an employer who conducts surface coal mining operations. PDER is not such a person". James E. Leber v Pennsylvania Department of Environmental Resources, supra at 207, 91 I.D. at ___ (footnote omitted). Petitioner has presented no evidence that PDER is engaged in surface coal mining operations. The question of whether some other agency of the Commonwealth of Pennsylvania is engaged in surface coal mining operations is not germane to the issue of whether PDER is a proper party respondent in an employee protection proceeding.

A petition for reconsideration may be granted only in extraordinary circumstances where sufficient reason appears therefore. 43 CFR 4.21(c). Petitioner has alleged no facts or pertinent law which would justify reconsideration of our decision in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the

Secretary of the Interior, 43 CFR 4.1, the petiton for reconsideration is denied.

/S/ C. Randall Grant, Jr.
C. Randall Grant, Jr.
Administrative Judge

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

JAMES E. LEBER

V

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

IBLA 83-867 Decided: April 24, 1984

Interlocutory appeal from ruling of Administrative Law Judge Joseph E. McGuire denying motion to dismiss application for review of alleged discriminatory action.

CH 3-2-D.

Reversed and remanded to Hearings Division.

Surface Mining Control and Reclamation Act of 1977: Discrimination: Generally-Surface Mining Control and Reclamation Act of 1977: Employee Protection: Generally

Sec. 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1293 (1982), prohibits any "person" from discriminating against any employee by reason of his involvement in any proceeding under the Act. An aggrieved employee may fie an application for review of any such discrimination with the Department of

the Interior. For purposes of sec. 703 employee protection proceedings, the state agency charged with enforcement of the Act is not deemed a person within the meaning of the statute where review of alleged discriminatory action is sought by one of its employees.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This proceeding was initiated by James E. Leber (Leber) through the filing of an application for review or alleged discriminatory actions committed against him by his employer, the Pennsylvania Department of Environmental Resources (PDER). The application was filed pursuant to section 703 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA, Act), 30 U.S.C. Section 1293 (1982), and the regulations at 30 CFR Part 865. Leber represented in his application that he had been subjected to disciplinary action in his job as a result of his aggressive enforcement of the surface mining law. Specifically mentioned was a suspension without pay resulting from an incident involving his

work as a mine inspector. Also mentioned were "punitive transfers." These actions were alleged to be discriminatory in that they were in retaliation for his aggressive investigation and enforcement activities, as well as for his report of alleged illegal activity by one of his supervisors. Leber's application for temporary relief, filed May 23, 1983, alleged discriminatory actions by his employer including, inter alia, increased work hours in excess of state regulations, changes in work assignments, downgraded performance evaluations, and overtime assignments.

Pursuant to the application for review, a hearing was held before Administrative Law Judge Joseph E. McGuire from July 19, 1983, in Pittsburgh, Pennsylvania. Counsel for PDER made a motion before the Administrative Law Judge to dismiss the application on the ground that PDER was not a "person" within the meaning of the applicable statute, section 701(19) of

SMCRA, 30 U.S.C Section 1291(19) (1982), and that it was, therefore, not subject to the jurisdiction of the administrative agency for purposes of a section 703 proceeding. The motion to dismiss was denied by Judge McGuire. Subsequently, at the close of the hearing, counsel moved that the issue of whether PDER came within the statutory definition of a person be certified to the Board as an interlocutory appeal. This motion was also denied by the Administrative Law Judge. Thereafter, counsel petitioner the Board, pursuant to 43 CFR 4.1272, for permission to pursue an appeal of an interlocutory ruling of the Administrative Law Judge that PDER is a person for purposes of section 703 of SMCRA and 30 CFR Part 865, relating to protection against discriminatory action by employers. The petition was granted by order of this Board dated September 9, 1983.

Counsel for appellant, PDER, asserts in

the statement of reasons for appeal that the Commonwealth of Pennsylvania and its agencies are not within the scope of the definition of a "person" under section 701(19) of SMCRA and, hence, that PDER is not a proper party respondent in an employee protection proceeding under section 703 of SMCRA. Counsel further contends that interpreting section 703 of SMCRA to regulate PDER would be violative of the Tenth Amendment to the United States Constitution.

Counsel for Leber contends in his brief that PDER is a person for purpose of employee protection proceedings under section 703 of the Act. Counsel cites the regulation at 30 CFR 700.5 which includes state agencies within the definition of a person under SMCRA. Further, counsel for Leber argues that employee protection proceedings under section 703 are not violative of the Tenth Amendment, where PDER is the employer, since the Commonwealth

has voluntarily decided to participate in the regulation of surface mining operations in Pennsylvania under the Act, which the Federal Government would otherwise regulate independently.

The Office of the Solicitor has filed an amicus curiae brief in this proceeding. The Solicitor argues that a section 703 employee protection proceeding does not arise against the Commonwealth of Pennsylvania where the alleged discrimination arises from disciplinary action. This result is compelled, the Solicitor asserts, by the statutory and regulatory definition of a "person" under the Act.

[1] Section 703(a) of SMCRA provides protection for employees against discrimination resulting from involvement in proceedings under the Act:

> Sec. 703.(a) No person shall discharge, or in any other way discriminate against, or cause to be fired or discriminated against

> any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

30 U.S.C. Section 1293(a) (1982). Section 703(b) provides that any employee who believes that he has been discriminated against by any person in violation of section 703(a) may apply to the Secretary of the Interior for a review of such alleged discrimination. For purposes of SMCRA, the term "person" is defined at section 701(19) as follows: "(19) `person' means an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." 30 U.S.C. Section 1291(19) (1982). Thus, the statutory definition of a "person" does not embrace a governmental agency.

Reference to the regulations promulgated pursuant to the Act discloses the following

definition:

> Person means an individual, Indian tribe when conducting surface coal mining and reclamation operations on non-Indian lands, partnership, association, society, joint venture, joint stock company, firm, company, corporation, cooperative or other business organization and any agency, unit or instrumentality of Federal, State or local government including any publicly owned utility or publicly owned corporation of Federal, State or local government.

30 CFR 700.5 Although the original regulatory definition of "person" embodied the same language as the statutory definition, the definition was expanded in 1979 to include governmental agencies. 44 FR 15314 (Mar. 13, 1979). One reason given for the expanded definition is that governmental agencies are subject to regulation under the Act pursuant to section 524, 30 U.S.C. Section 1274 (1982), when engaged in surface coal mining and reclamation operations. 44 FR 14912 (Mar. 13, 1979). The preamble to the regulatory revision relates a further reason for expanding the definition of a "person":

> The Act mandates the involvement of and close coordination among many different agencies. Various agencies play important roles in the abandoned land's [sic] program in Title IV of the Act, in the regulatory process in terms of providing data, permit application reviews, performance standards compliance, and in designation of lands unsuitable for all or certain types of surface coal mining operation. OSM [Office of Surface Mining] believes the involvement of other State and local agencies, which the Act specifies, establishes an interest on the part of those agencies in actions taken by the regulatory authority under State programs, particulatly actions relating to permits and designations. Therefore, OSM believes that inclusion of the government agencies in the definition of "person" is justified. OSM does not intend by this to expand upon an agency's capacity to sue or be sued where the Act does not clearly indicate that the agency has an interest in the actions being taken. In such situations, existing principles of State or Federal law would govern.

44 FR 14912 (Mar. 13, 1979). Thus, a further reason for the expanded definition is to allow the participation of interested State and local governmental agencies in proceedings before the regulatory authority.

Leber argues that the extension of the regulatory definition of person to include any agency of state government encompasses PDER for purposes of an employee protection action under the Act. Leber finds no constraints on the definition of person. Both PDER and the Solicitor point to the explanation provided by the Department in the preamble, quoted above, as supporting a construction that the definition of person was expanded for only limited purposes.

We agree with PDER and the Solicitor and find that in this case PDER is not a person for purposes of an employee protection proceeding under 30 U.S.C. Section 1293 (1982). Clearly, the intent of the regulations was to consider an agency, such as PDER, a "person" to the extent it might be conducting surface coal mining operations under the Act or to the extent it might be involved in those functions highlighted in the preamble, i.e., abandoned

lands program, the regulatory process in terms of providing data, permit applicaiton review, performance standards compliance, and designation of lands unsuitable for all or certain types of surface coal mining operations. 44 FR 14912 (Mar. 13, 1979).

There is no indication that the Department intended to create a new forum whereby state employees could seek review of actions taken by the state with regard to state employment practices. It appears that the intent of Congress in enacting 30 U.S.C. Section 1293 (1982) was to encourage employees of those persons involved in surface coal mining operations to come forward to report violations of the Act while at the same time offering protection to the employee.

The regulations in 30 CFR support the conclusion that PDER is not a "person" subject to the provisions of 30 U.S.C. Section 1293 (1982). Section 865.11(b) of 30 CFR requires

that "[e]ach employer conducting operations which are regulated under this Act shall within 30 days from the effective day of these regulations, provide a copy of this part to all current employees and to all new employees at the time of their hiring." (Emphasis added.) The key phrase is that emphasized. The Department was concerned that all employees guaranteed protection under the Act should be aware of their rights. Thus, employers, "conducting operations which are regulated under this Act" are required to provide the regulations to their employees. Regulated operations under the Act are surface coal mining operations. 30 U.S.C. Section 1291(28); 30 CFR 700.5. The inescapable conclusion is that a "person" under 30 U.S.C. Sectin 1293(a) is an employer who conducts surface coal mining operations. PDER is not such a person. For the reasons stated above, the Board concludes that the motion to dismiss filed by PDER should

have been granted.

In light of this holding, we find it unnecessary to consider arguments raised concerning the effect of the Tenth Amendment on the statutory language.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the interlocutory ruling appealed from denying appellant's motion to dismiss is reversed. The case is remanded to the Hearings Division for action consistent with this decision.

/S/ C. Randall Grant, Jr.
C. Randall Grant, Jr.
Administrative Judge

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

JAMES E. LEBER

V

GEORGE STERLING, ET AL.

IBLA 85-242 Decided: August 29, 1985

Interlocutory appeal from a ruling of Administrative Law Judge Joseph E. McGuire holding state surface mining regulatory agency to be a proper party respondent in an employee protection proceeding. CH 4-1-D.

Reversed and remanded to Hearings Division.

1. Surface Mining Control and Reclamation Act of 1977: Discrimination: Generally-Surface Mining Control and Reclamation Act of 1977: Employee Protection: Generally

A state agency is not a "person" for purposes of an employee protection proceeding initiated by an aggrieved employee pursuant to sec. 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1293 (1982), and the Department has no jurisdiction to adjudicate an application for review of alleged discriminatory acts by that agency.

Leber v Pennsylvania Department of Environmental Resources, 80 IBLA 200, 91 I.D. 197 (1984), modified to the extent it is inconsistent herewith.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This case constitutes an interlocutory appeal by the Pennsylvania Department of Environmental Resources (PDER) from an order of Administrative Law Judge Joseph E. McGuire, dated December 27, 1984, ruling that PDER is a "person" for purposes of an employee protection proceeding under section 703 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. Section 1293 (1982), and, thus, subject to Departmental jurisdiction. The case was initiated on February 3, 1984, when James E. Leber (applicant herein), formerly a Surface Mine Conservation Inspector with PDER, filed an application for review of alleged discriminatory acts by certain "supervisory personnel" pursuant to section 703 of SMCRA, and 30 CFR 865.12. The case was assigned

docket number CH 4-1-D in the Hearings Division.

On April 24, 1984, during the pendency of this case, the Board decided Leber v Pennsylvania Department of Environmental Resources PDER, 80 IBLA 200, 91 I.D. 197 (1984), aff'd, Civ. No. 84-723 (M.D. Pa. Feb. 11, 1985), appeal filed, Civ. No. 85-5166 (3rd Cir. Mar. 18, 1985), in a related but separate interlocutory proceeding, involving another application for review of alleged discriminatory acts (CH 3-2-D) filed by applicant against PDER. We concluded in Leber that "PDER is not a person for purposes of an employee protection proceeding under 30 U.S.C. Section 1293." Id. at 206, 91 I.D. at 200. However, we also held "the intent of the regulations was to consider an agency, such as PDER, a `person' to the extent that it might be conducting surface coal mining operations under the Act." Id. We concluded, based on the

record before us, that PDER was "not such a person." Id. at 207, 91 I.D. at 201. Thus, an inference may be drawn from our opinion in Leber that PDER would be considered a "person" for purposes of a section 703 proceeding if it were engaged in surface coal mining operations under the Act. Indeed, this was the apparent understanding of the district court in reviewing Leber.

By order dated April 26, 1984, the Board lifted a previous stay which had been invoked by order dated April 13, 1984, pending the decision in Leber v PDER, and remanded the case to Judge McGuire for further proceedings in light of our opinion in Leber. On May 21, 1984 the Hearings Division, Office of Hearings and Appeals (OHA), received a copy of interrogatories directed to PDER, concerning whether the Commonwealth of Pennsylvania was then engaged in surface coal mining operations. On May 29, 1984, PDER filed a Motion to dismiss

applicant's application for review, arguing that PDER is not properly subject to Departmental jurisdiction for purposes of a section 703 proceeding. On June 7, 1984, PDER filed a motion for a protective order excusing it from answering the interrogatories. By order dated June 21, 1984, Judge McGuire denied the motion for a protective order and instructed PDER to answer the interrogatories in order that he could rule on PDER's motion to dismiss. On June 29, 1984, PDER filed a motion for certification to the Board of Judge McGuire's June 21, 1984 order as an interlocutory ruling pursuant to 43 CFR 4.1124, because a determination by the Board the PDER is not subject to Department jurisdiction for purposes of a section 703 proceeding would "materially advance the ultimate disposition of the [case]." By order dated July 9, 1984, Judge McGuire essentially denied the motion for certification and again ordered PDER to answer

the interrogatories propounded by applicant, in order that it could be determined whether PDER is engaged in surface coal mining operations and is, thus, subject to a section 703 proceeding.

On July 26, 1984, PDER filed a petition for permission to appeal from Judge McGuire's July 9, 1984 order refusing to certify his June 21, 1984, order as an interlocutory ruling. This petition was docketed by the Board. By order dated October 11, 1984, the Board declined to grant an interlocutory appeal from denial of a protection order which would have allowed PDER to not answer certain interrogatories concerning whether PDER is engaged in surface coal mining. We stated that in Leber the record had not indicated that PDER was engaged in surface coal mining operations and this had been a "material factor in the decision."

On October 25, 1984, PDER submitted answers to applicant's interrogatories, stating

it is not engaged, as an operator, in surface coal mining operations as defined in section 701(28) of SMCRA, 30 U.S.C. Section 1291(28) (1982). On November 1, 1984, applicant filed with the Hearings Division, OHA, a second set of interrogatories, a request for the production of certain documents and a request for the admission of the authenticity of certain documents. On December 5, 1984, PDER responded to applicant's second set of interrogatories and request for admission, and submitted numerous documents. In its answer to the interrogatories, PDER stated it had engaged in the dredging of the Schuylkill River in order to control flooding, pursuant to State statute and PDER permit no. 5475714, dated April 26, 1976, which expired on December 31, 1978, and that such dredging had recovered a certian amount of "coal fines," which were processed and transported to certain locations. PDER also stated it has contracted for the

removal of coal and other materials from "coal waste banks."

By order dated December 27, 1984, Judge McGuire held that: "Based upon those facts which applicant's discovery methods have adduced, it has been demonstrated that [PDER] has engaged in surface coal mining operations and thus is a `person' for purposes of this section 703 employee protection proceeding." By order dated January 11, 1985, Judge McGuire granted PDER's motion for certification to the Board of his December 27, 1984, order as an interlocutory ruling, pursuant to 43 CFR 4.1124. The Board accepted the certification of the interlocutory ruling, holding that it is "controlling" because "if it were found to be in error, [PDER] would not be a property party respondent in this section 703 employee protection proceeding." By order dated February 5, 1985, the Board granted PDER's request for a stay of further proceedings

before Judge McGuire "pending disposition of the interlocutory appeal."

In its brief herein, PDER contends it is not engaged in surface coal mining operations as defined in section 701(28) of SMCRA, where the primary purpose of its dredging operations, undertaken in the Schuylkill River "since the 1940's" is the removal of accumulated wastes, in order to prevent water pollution and flooding. Thus, PDER submits its operations were aimed at the protection of the public's health, safety, and welfare and not the commercial extraction and sale of coal. In the alternative, PDER argues its dredging activities are exempt from the provisins of SMCRA, including the employee protection provisions of 30 U.S.C. Section 1293 (1982), pursuant to section 528 of SMCRA, 30 U.S.C. Section 1278 (1982), which excludes in part the "extraction of coal as an incidental part of * * * State * * * government-financed * * *

construction." PDER states that coal is extracted as an incidental part of its dredging operations, which constitute the "construction or reconstruction of the river channel." PDER also contends it is not subject to Departmental jurisdiction for purposes of a section 703 proceeding because it is not a "person" under that statutory provision or its implementing regulations. Finally, PDER argues that to subject it to Departmental jurisdiction herein would violate the 10th and 11th amendments to the United States Constitution.

In his brief herein, applicant contends PDER's dredging operations constitute surface coal mining opertions under SMCRA and such activities are not exempt from the provisions of SMCRA. Applicant also argues that, as defined by regulations of the Department, PDER is a "person" within the meaning of 30 U.S.C. Section 1293 (1982), as well as other provisions of SMCRA. Applicant concludes that

PDER is subject to Departmental jurisdiction for purposes of a section 703 proceeding, and that there is no violation of the 10th and 11th amendments to the United States Constitution.

[1] Section 703(a) of SMCRA, 30 U.S.C. Section 1293(a) (1982), which applicant seeks to invoke, provides that "[n]o person" shall discriminate against any employee by reason of his participation in any proceeding under SMCRA. Any employee who believes he has been illegally discriminated against under that statutory provision may, under the provisions of section 703(b) of SMCRA, 30 U.S.C. Section 1293(b) (1982), "apply to the Secretary [of the Interior]" for a review of such alleged discrimination, and the Secretary shall investigate and take certain action as a result of that investigation, including ordering a violating party to engage in "affirmative action to abate the violation." Section 701 of SMCRA, 30 U.S.C. Section 1291 (1982), defines

the term "person" for "the purposes of the Act." That provision states: "`[P]erson' means an individual, partnership, association, society, joint stock company, firm, company, corporation, or other busines organization." 30 U.S.C. Section 1291(19) (1982).

We conclude that the term "person" for purposes of SMCRA, including section 703, is clearly defined by the statute. The statutory definition does not specifically include a state or any agency of a state and there is no cited term which arguably encompasses such an entity. As the Court in Colautti v Franklin, 439 U.S. 379, 392 n.10 (1979), stated, quoting from 2A Sands, Statutes and Statutory Construction Section 47.07 (4th ed. Supp. 1978), "[a] definition which declares what a term `means' * * * excludes any meaning that is not stated." Thus, the term "person" in SMCRA would exclude states or their agencies from its definition. In contrast, the court in Hustead

v Norwood, 529 F.Supp. 323 (S.D.Fla. 1981), concluded a state is a "person" under the Freedom of Information Act because the term is specifically defined at 5 U.S.C. Section 551(1) and (2) (1982), to include a "public * * * organization" other than a federal agency. See also 15 U.S.C. Section 78c(a)(9) (1982); 42 U.S.C. Section 6903(15) (1982).

In United States v United Mine Workers of America, 330 U.S. 258, 275 (1947), the Supreme Court concluded that the term "persons" in the Norris-La Guardia Act did not include the United States, stating that the "absence of any * * * provisions extending the term to sovereign governments implies that Congress did not desire the term to extend to them," even though the United States, as an employer, was engaged in activities which could be subject to regulation by the Act. The term "persons" in the Norris-La Guardia Act was interpreted by the Court to include only "corporations,

companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," as the term is defined in 1 U.S.C. Section 1 (1982), in the absence of any contrary provision in the Norris-La Guardia Act. Similarly, in In Re Equity Funding Corporation of America Securities Litigation, 416 F. Supp. 161, 198 (C.D. Cal. 1976), aff'd, 603 F.2d 1353 (9th Cir. 1979), the court held that Congress "literally excluded states from the class of `persons' who can be sued under [section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78j(b) (1982)]," where the term "person" was then defined as "an individual, a corporation, a parthership, an association, a joint-stock company, a business trust, or an unincorporated organization," at 15 U.S.C. Section 78c(a)(9) (1970), amended by, Act of June 4, 1975, P.L. 94-29, Section 3(2), 89 Stat. 97.

In contrast, in Georgia v Evans, 316 U.S. 159, 161 (1942), the Court concluded that, for purposes of the Sherman Anti-Trust Act, the term "person" includes states, stating that "[w]hether the word ;person' * * * includes a State or the United States depends upon its legislative environment," citing Ohio v Helvering, 292 U.S. 360, 370 (1934). See also Sims v United States, 359 U.S. 108, 112 (1959). The Court also quoted from United States v Cooper Corp., supra at 604-05, to the effect that

> there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.

The term "person" in the Sherman Anti-Trust Act, as defined by Congress, was held sufficiently broad to encompass states given the factors militating in favor of such a

construction. This is properly distinguished from the term "persons" in the Norris La-Guardia Act, as interpreted by the Court in United Mine Workers, applying the definition in 1 U.S.C. Section 1 (1982), or the term "person" in SMCRA, given the explicit definition in 30 U.S.C. Section 1291(19) (1982). Applying these standards of construction, we find the explicit definition indicates the term "person" in SMCRA should be given a narrow construction, and that states are excluded from its ambit. Accordingly, as we held in Leber v PDER, supra, "the statutory definition of a `person' does not embrace a governmental agency." 80 IBLA at 204, 91 I.D. at 199.

Our conclusion is buttressed by another provision of SMCRA, i.e., section 524, 30 U.S.C. Section 1274 (1982), which provides that "[a]ny agency, unit, or instrumentality of Federal, State, or local government * * * which proposes to engage in surface coal mining

operations which are subject to the requirements of this Act shall comply with the provisions of title V." Title V of SMCRA, 30 U.S.C. Section 1251-1279 (1982), generally sets forth environmental protection performance standards for surface coal mining operations and the regulatory scheme for achieving compliance with those standards. Thus, section 506(a) of SMCRA, 30 U.S.C. Section 1256(a) (1982), provides in general that "no person" shall engage in surface coal mining operations without having obtained a permit and section 515(a) of SMCRA, 30 U.S.C. Section 1265(a) (1982), provides that such a permit shall require mining operations to "meet all applicable performance standards of this Act, and such other requirements as the regulatory authority shall promulgate." Other provisions of Title V of SMCRA set forth the duties and obligations of "person[s]" subject to the regulatory provisions of Title V. See, e.g. 30

U.S.C. Section 1252(a), 1262(a) (1982). In addition, other provisions of Title V of SMCRA set forth the duties and obligations of "permittee[s]," including the maintenance of appropriate records and the reporting of information relative to mining operations to the regulatory authority. See, e.g., 30 U.S.C. Sectio 1267(b) (1982).

In view of the use of the term "person" or appropriate substitutes (e.g., permittee or applicant for permit) in Title V of SMCRA, we must conclude that section 524 of SMCRA would be superfluous if the statutory definition of "person" is already deemed to encompass states or their agencies. However, it is well settled that a statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." 2A Sands, Sutherland Statutory Construction Section 46.06 (4th ed. 1984). Therefore, in order to give effect to section 524 of SMCRA,

we conclude that it was specifically enacted because the term "person," defined in 30 U.S.C. Section 1291(19) (1982), does not include states or their agencies and such entities would not otherwise be subject to the provisions of Title V. The resulting conclusion is that states are not "person[s]" for purposes of an employee protection proceeding under section 703 of SMCRA, although a state is subject to Title V of SMCRA.

We also believe this dichotomy between the regulation of surface coal mining operations under Title V of SMCRA and section 703 employee protection proceedings, in terms of the applicability of the statutory provisions to states, was preserved in the Departmental regulations implementing the statute. When originally promulgated, such regulations defined the term "person" to mean "an individual, partnership, association, society, joint stock company, firm, company,

corporation, or other business organization," as the term is defined in 30 U.S.C. Section 1291(19) (1982). 30 CFR 700.5 (42 FR 62676 (Dec. 13, 1977)). However, effective April 12, 1979, the Department, amended 30 CFR 700.5 to provide that the term "person" also means "any agency, unit, or instrumentality of Federal, State or local government." 44 FR 15314 (Mar. 13, 1979). The Department explained the expanded definition in part as follows: "[S]pecified government agencies are included because under Section 524 of the Act, they are subject to regulation when engaged in surface coal mining and reclamation operations and because such agencies have definite interests in actions taken under the Act." 44 FR 14912 (Mar. 13, 1979). The Department also rejected a proposed rule which limited the rule only to governmental agencies proposing to conduct surface coal mining operations and further explained the amendment as follows:

> The Act mandates the involvement of and close coordination among many different agencies. Various agencies play important roles in the abandoned [lands] program in Title IV of the Act, in the regulatory process in terms of providing data, permit application reviews, performance standards compliance, and in designation of lands unsuitable for all or certain types of surface coal mining operation. (See Section s 503(a)(6), 504(b), 507(b)(11), 508(a)(9), 510(b)(3), 510(c), 515(b)(2)(8), 515(b)(10)(B), 515(b)(12), 515(c), 515(e) and 522 of the Act. * * *
>
> OSM believes the involvement of other State and local agencies, which the Act specifies, establishes an interest on the part of those agencies in actions taken by the regulatory authority under State programs, particularly actions relating to permits and designations. Therefore, OSM believes that inclusion of the government agencies in the definitino of "person" is justified. <u>OSM does not intend by this to expand upon an agency's capacity to sue or be sued</u> where the Act does not clearly indicate that the agency has an interest in the actions being taken. In such situations, existing principles of State or Federal law would govern. [Emphasis added.]

44 FR 14912 (Mar. 13, 1979).

While the definition of "person" in 30 CFR 700.5 currently encompasses states and their agencies, we conclude that the broadening of the statutory definition by regulation had a

very limited purpose and, moreover, must be construed to be consistent with the terms of the statute. The preamble to the revision of the regulation, quoted above, indicates that states were included in the definition of "person" because of the obligations imposed upon the states under Title V of SMCRA, by virtue of section 524 of SMCRA. Further, the preamble discloses the intent to allow state agencies to become involved in proceedings where agencies have "definite interests in actions taken under the Act." 44 FR 14912 (Mar. 13, 1979). However, the preamble only identifies two areas where states have an interest in actions taken under the Act, viz., the abandoned mine lands program under Title IV of SMCRA, 30 U.S.C. Section 1231-1243 (1982), and the control of the environmental impacts of surface coal mining operations under Title V of SMCRA. There is no indication of an intention to subject state agencies to section 703

employee protection proceedings. Moreover, the preamble states that the amended rule is not intended to "expand upon an agency's capacity to * * * be sued." 44 FR 14912 (Mar. 13, 1979).

In addition, the regulations at 30 CFR Part 865 governing employee protection proceedings bear out this conclusion. The prefatory sentence to 30 CFR Part 700.5 states that "[a]s used throughout this chapter, the following terms have the specified meaning except where otherwise indicated." (Emphasis added.) We conclude that the regulations in 30 CFR Part 865 (Protection of Employees) indicates that the term "person" in that context has a different meaning. 30 CFR 865.11(a) reiterates the statutory prohibition that "[n]o person" shall discriminate against any employye who has engaged in certain actions, including "[r]eporting alleged violations or dangers to the Secretary, the

State Regulatory Authority, or the employer or his representative" (30 CFR 865.11(a)(1)(i). This regulation indicates that a state regulatory authority, such as PDER, as well as the Secretary, is distinguished from an employer in a case of employee discrimination.

Finally, it is important to realize that Mr. Leber has other remedies available to him. Indeed, in OSM's brief in Leber, quoted by PDER in its brief herein at 30, OSM, which had promulgated 30 CFR 700.5, stated that:

> It was not the intent of the Act, nor was it the intent of the Secretary in promulgating regulations to implement the [Act], to create a forum for review of actions taken by states in implementing and enforcing state employment policies, rules, and regulations. Existing forums, including federal and state civil service commissions (i.e., 71 P.S. 741.1 et seq.) and federal antidiscrimination statutes (i.e., 42 U.S.C. Section 1983) provide the necessary safeguards and forums to protect the government employee from non-meritorious or discriminatory acts committed by a governmental employer. (Emphasis in original.)

The Board in Leber v PDER, supra at 206, 91 I.D. at 200, essentially concurred in this

assessment. Moreover, in Sterling v Clark, Civ. No. 84-0500 (M.D. Pa. Apr. 27, 1984), which was a proceeding initiated April 12, 1984, by the individual respondents herein for a temporary restraining order preventing the Department from conducting a section 703 investigation on behalf of applicant against the plaintiffs (individual respondents herein) or PDER, Judge Rambo quoted from the Board's decision in Leber to the effect that any remedy available to applicant must rely on other federal or state law, in holding the Department was precluded from conducting an investigation and, hence, the case was moot.

We therefore, conclude that PDER is not a "person" for purposes of a section 703 employee protection proceeding and, thus, the Department does not have jurisdiction to adjudicate applicant's claim brought under 30 U.S.C. Section 1293 (1982). We expressly modify our decision in Leber v PDER, supra, to the extent

that it indicated a state agency engaged in surface coal mining operations could be subject to a section 703 employee protection proceeding.

PDER also raises a number of constitutional challenges to the invocation of Departmental jurisdiction in the present context. However, as we have ofter said, it is not within the jurisdiction of this Board to adjudicate the constitutionality of an act of Congress. E.g., Andy D. Rutledge, 82 IBLA 89 (1984).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the interlocutory ruling appealed from is reversed and the case is remanded to Judge McGuire for further proceedings consistent herewith.

/S/ C. Randall Grant, Jr.
C. Randall Grant, Jr.
Administrative Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for Certiorari were mailed this day by United States Mail, first-class, postage prepaid, upon the following persons at the following addresses:

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I further certify that all parties required to be served, have been served.

Lee R. Golden

DATED: 4-2-86